



**CONFEDERATED TRIBES OF
COOS, LOWER UMPQUA AND SIUSLAW INDIANS
TRIBAL GOVERNMENT**

1245 Fulton Avenue - Coos Bay, OR 97420
Telephone: (541)888-9577 Toll Free 1-888-280-0726 Fax: (541)888-2853

November 25, 2020

Vicki L Walker, Director
Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, OR 97301-1279

**RE: Comments and Request for Consultation on Oregon Department of State
Lands Proposed Partial 404 Assumption Under the Clean Water Act**

Dear Director Walker:

This letter is submitted on behalf of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians ("Tribe" or "CTCLUSI") regarding the proposed partial assumption under Section 404 of the Clean Water Act ("CWA") by the Oregon Department of State Lands ("DSL") from the U.S. Army Corps of Engineers ("USACE"). This partial assumption has the potential to adversely impact Tribal resources currently protected under the federal process. The Tribe has numerous concerns regarding the proposal related to the Tribe's cultural resources, water quality, and consultation related to federal trust responsibility. Accordingly, the Tribe provides the following comments and requests an opportunity to meet and consult with DSL about these concerns.

The Tribe is a federally recognized Tribal government. The history of CTCLUSI is wrought with struggle and loss; however, it is also filled with commitment and connection. Today, CTCLUSI continues a legacy of commitment to its people, land, water, and resources that has never diminished. What has changed over the 165 years are the institutions and these changes have been significant to how the Tribe is able to protect and steward these invaluable resources, which is foundational work set forth in the preamble of CTCLUSI's constitution.

Currently, the 404 process is led by a federal agency. For Tribal Nations, this means that there are processes that include opportunities for meaningful engagement by Tribes. These include requirements for consultation and coordination under Executive Order 13175, the National Environmental Policy Act, the Endangered Species Act, and through the Section 106 process of the National Historic Preservation Act. Assumption of 404 authority by DSL will end the coordination with Tribe that is required to occur under these authorities. Moreover, a Coastal Zone Management Act ("CZMA") consistency determination will not apply to a 404-permit issued by DSL.

The current State's statutes provide significantly less protection to cultural resources and sensitive information than federal laws. If DSL assumes 404 authority, the resulting permits are "de-federalized" and federal protections will largely not apply. There needs to be explicit changes to this proposal so that equivalent processes exist to identify, assess, and mitigate impacts to cultural resources.

1. Protections under federal cultural resource laws will be diminished by this proposal.

Section 106 of the National Historic Preservation Act of 1966 ("NHPA") requires that federal agencies take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation ("ACHP") an opportunity to comment. Historic properties include prehistoric or historic sites, districts, buildings, structures, objects, landscapes, or properties of traditional religious or cultural importance listed on or eligible for listing on the National Register of Historic Places ("National Register").

NHPA also requires that federal agencies consult with Indian Tribes when Tribal cultural or historic resources may be adversely affected by agency actions. Section 106 requires federal agencies to consider the effects of federal undertakings on a Tribe's cultural resources and to consult with the affected Tribe regardless of the location of the historic property.

This review process requires respectful government-to-government consultation with all Indian Tribes that attach cultural significance to historic properties. In other words, Section 106 review is an avenue to identify historic properties potentially affected by an undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects.

Under NHPA and Section 106, Tribes must be given a reasonable opportunity to identify their concerns and to participate in the resolution or mitigation of adverse effects from the project even if the agency fails to involve the Tribe on its own volition. Further, if an agency has not contacted an Indian Tribe for consultation the Tribe may directly request involvement as a consulting party.

Assumption of the 404-permitting process by DSL would end the Section 106 process because, by definition, an action by DSL is not a federal undertaking as defined by the NHPA. While the state does have cultural resource laws, these laws as pointed out in detail in the October 18, 2019 letter from the Oregon State Historic Preservation Office lack the level of protection afforded under state law. This would result in less protection for cultural resources, including:

- Traditional cultural properties ("TCPs") would not be given any level of protection that they have currently under Section 106. There is not equivalent protection for TCPs under state law. Statewide Planning Goals only protect those resources listed on the federal National Register of historic places with no consideration of those properties, including TCPs that are eligible for listing or recognized by the State Historic Preservation Office as eligible for listing
- ORS 358.653 discusses inadvertent damage to "real property of historic significance" on public lands but omits historic properties of significance on private lands that would apply under federal law.

- It is unclear how investigation and enforcement of burial violations afforded under NAGPRA would work under state regulations.
- An archaeological site under state definitions is not consistent with federal definitions – state law requires archaeological testing to confirm site significance through physical presence of archaeological objects unlike federal law guidance that considers all National Register Criteria.
- Most of the state has not been surveyed. Without the Section 106 process, there would be no state requirement to survey for above ground resources and very little subsurface testing even occurs as mostly pedestrian survey is conducted even when there is less than 30% ground visibility. Moreover, existing local surveys (relied upon by local jurisdictions are outdated and there is no requirement to update them).
- The State provides a weaker definition of historic resources. Historic resources under federal law are those resources that are older than fifty years in age, while state law only recognizes those resources that are older than seventy-five years.
- There is no state requirement for appropriate mitigation when adverse effects to a cultural resource occurs.
- There is no process in state to define a Area of Potential Effects (“APE”), which included both direct and indirect effects.

2. The State has no duty of consultation.

If DSL assumes 404 authority, the requirements to consult under federal Executive Order 13175 (“Order”) will no longer apply. That Order requires federal agencies to consult and coordinate with Tribes in a meaningful and appropriate way. Currently, USACE is required to consult prior to making a 404 determination, but the Order will not apply to DSL.

While we appreciate the relationship with DSL and its willingness to meet and consult with the Tribe, the legal requirement to consult as provided in the Order does not exist under state law. The Tribe is not an “interested party” or a “stakeholder” in this process. The Tribe as a sovereign nation carries much greater weight than either an interested party or a stakeholder and tribes are often provided only an opportunity to comment through the public process. This does not substitute for the requirements of the Order.

3. Tribal CWA authorities must be respected.

DSL’s authority under the CWA is limited to state waters. There must be clarification that the USACE, EPA, and Tribes retain CWA authority on Tribal lands and waters.

4. Endangered Species Act and Coastal Zone Management Act requirements cannot be weakened.

As with the requirements of Section 106 of the NHPA, the requirements of review under the Endangered Species Act (“ESA”) and CZMA will not apply to a state action. Protection of ESA species often involves species that have Tribal religious and cultural significance. Protection of the endangered species and their habitat is of utmost concern to the Tribe. Likewise,

concurrency review under the CZMA often ensures that sensitive coastal habitats are protected. Moreover, for CTCLUSI, CZMA concurrency review is one method to ensure that protections under the Coos Bay Estuary Management Plan Policy # 18, which requires the development of protections for cultural resources, has occurred. Weakening review under the ESA and CZMA is not acceptable.

5. State funding must be ensured.

Meaningful review of projects subject to the 404 process can be timely and expensive. DSL's funding is subject to approval by the State Legislature, which can be significantly impacted by statewide funding issues, such as we have seen recently with COVID and wildfires. DSL currently does not have sufficient staff and resources to meaningfully implement a 404 program. It is unclear what assurance there are that adequate funding will be provided and maintained to implement the program.

6. Additional areas of concern

A 2020 legislative report provided by DSL in July 2020 highlights several authorities that would no longer apply "because the Department would be processing and issuing 404 permits" and "not the USACE." CTCLUSI has serious concerns related to the protection of cultural resources, consultation; and authorities as highlighted above. Additionally, the Tribe is concerned with other components of the partial assumption including but not limited to:

- How is the state integrating scale of impact into the partial assumption process?
- How is the state tying partial assumption to existing certifications under other agencies such as ODEQ and ODOE?

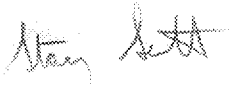
We understand that the State is interested in aspects of the 404 assumption, which could provide greater certainty with respect to some parts of the permitting. However, without further clarity it is unclear how the agency will achieve equivalent results and more detail is needed to understand proposed processes such as agency coordination and statutory changes.

Conclusion

At this time, CTCLUSI would advise caution moving forward with this proposal without full consultation and endorsement by Tribal Nations in Oregon. Overall, we have identified serious concerns that moving forward with 404 assumption could harm natural and cultural resources of the Tribe. While there may be redundancies and opportunities for the State with respect to the assumption, we ask that the DSL consider our comments to ensure that CTCLUSI retains the rights and authorities to best care for Tribal homelands, resources, and people.

As stated above, we request government-to-government consultation with DSL to fully address these comments. Please contact either me at sscott@ctclusi.org or Roselynn Lwenya at rlwenya@ctclusi.org to further discuss our concerns and to coordinate a consultation meeting.

Sincerely,

A handwritten signature in black ink, appearing to read "Stacy Scott".

Stacy Scott
Tribal Historic Preservation Officer
Confederated Tribes of Coos,
Lower Umpqua, and Siuslaw Indians

Cc: Eric Metz
Barbara Poage